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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. HIEN MINH NGUYEN, Defendant.	Case No. 5:15-cr-00203-BLF UNITED STATES' TRIAL MEMORANDUM

The United States of America hereby respectfully submits the following trial memorandum. On December 1, 2015, by Superseding Indictment, a grand jury charged Defendant Hien Minh Nguyen ("Defendant") with 14 counts of bank fraud, in violation of 18 U.S.C. § 1344; and four counts of tax evasion, in violation of 26 U.S.C. § 7201. On August 9, 2015, Nguyen entered an open plea to the four tax evasion charges. The remaining 14 bank fraud charges are currently set for a stipulated-facts bench trial on February 21, 2017.

I. Background

In the Superseding Indictment, the government alleges that Defendant was a priest for the Diocese of San Jose between 1994 and 2015, and that he held various positions with the Catholic Church during that period. Between 2005 and 2011, Defendant was the Director of the Vietnamese Catholic Center, also known as the Trung Tam Cong Giao ("VCC"), which is a Church-affiliated community center and place of worship for Vietnamese parishioners in San Jose. Defendant was also the pastor of St. Patrick's Church. From at least 2005 through 2011, Defendant carried out a scheme to steal cash and checks from the Church, defraud federally-insured banks, and evade the taxes he owed on his illicit income.

In pleading open to the tax evasion charges, Defendant admitted that he stole cash from the Church, and that he failed to report that cash on his federal income tax returns. The bank fraud charges at issue here provide an avenue through which restitution could be ordered for the victims of Defendant's embezzlement,[1] an avenue that may not be available if Defendant is sentenced on the tax charges alone.

The bank fraud charges are based on numerous checks made out to the VCC that Defendant deposited into his own bank account. All of the checks were written by parishioners and made payable to the VCC, and they were all meant for the VCC, and not for Defendant. Nevertheless, Defendant took these checks, added his personal bank account number and signature to the back of each check, and deposited them into his personal bank account. By endorsing the checks and depositing them into his personal account, even though he knew he was not authorized to do so, and thereby intentionally misrepresenting to the Bank that he was authorized to deposit checks payable to the VCC into his own personal bank account, Defendant committed bank fraud.

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[1] Under the Mandatory Victims Restitution Act ("MVRA"), 18 U.S.C. § 3663A, a conviction including a "scheme, conspiracy, or pattern of criminal activity" expands the pool of potential "victims." Courts have found that bank fraud may involve a "scheme" that triggers this expansion. *See United States v. Hughes*, 149 F. App'x 692, 695-96 (9th Cir. 2005) (unpublished) (affirming district court's order of restitution to embezzler's victim after bank fraud convictions, and remanding for other reasons) (citing *United States v. Lawrence*, 189 F.3d 838, 846 (9th Cir. 1999)); *see also United States v. Eyraud*, 809 F.3d 462, 467-70 (9th Cir. 2015) (affirming district court's award of restitution to embezzlement victim above and beyond restitution provided by the plea agreement).

II. Stipulated Facts

As set forth in the First Stipulation of Fact for Trial, filed on January 27, 2017 (Doc. # 116), the parties stipulate that the following facts are true:

1. From 2005 through 2011, the defendant was a Catholic priest for the Diocese of San Jose ("the Diocese"); pastor of St. Patrick's Church ("St. Patrick's"); and the director of the Vietnamese Catholic Center, which is also known as the Trung Tam Cong Giao ("VCC").

2. While employed as a priest in the Diocese, the defendant received from parishioners cash donations which the parishioners intended to be for the benefit of the Church, St. Patrick's, and/or the VCC. During each of the years 2008 through and including 2011, defendant deposited some of these cash donations into his own personal bank account.

3. From 2005 through 2011, the defendant had signatory authority over the VCC's Bank of America accounts. During each of the years 2007 through and including 2010, defendant signed checks drawn on VCC's Bank of America accounts to pay his personal expenses.

4. While employed as a priest in the Diocese, the defendant received from parishioners checks made payable to the VCC, including the following:

Parishioner	Parishioner Bank Account	Check No.	Check Amount	Deposit Date	Count
K.N.	Bank of America account no. 8385	1043	$1,500	9/28/05	1
K.N.	Bank of America account no. 8385	1006	$500	2/2/06	2
K.N.	Bank of America account no. 8385	1155	$1,000	5/8/06	3
K.N.	Bank of America account no. 8385	1215	$500	10/31/06	4
K.N.	Bank of America account no. 8385	1393	$300	12/18/07	5
H.N.	California Savings and Loan account no. 5100	1106	$1,000	10/3/05	6
H.N.	California Savings and Loan account no. 5100	1119	$700	1/23/06	7
H.N.	Citibank account no. 9806	0102	$500	10/31/06	8
H.N.	Washington Mutual Bank account no. 7233	1050	$1,000	6/4/07	9
B.T.	Wells Fargo Bank account no. 1726	2484	$1,000	10/3/05	10
C.N.	Washington Mutual Bank account no. 4010	0328	$3,000	8/15/06	11
K.T.T.	Bank of America account no. 5803	1477	$3,000	9/28/06	12
K.T.T.	Bank of America account no. 4721	1005	$2,500	10/15/07	13
J.T.N.	Bank of America account no. 1573	2341	$2,500	11/14/07	14

5. Each of the checks listed in paragraph 4, above (the "Checks"), were made payable to the VCC, and the parishioners who wrote them intended and believed that the funds backing them would be used for the benefit of the VCC, and the parishioners gave them to defendant for that purpose

6. From 2005 through 2011, although the defendant had signatory authority over the VCC's Bank of America accounts, he was not authorized by the Diocese, the Church, St. Patrick's, the VCC, or any other individual or entity, to deposit checks payable to the VCC into his own personal bank account, and he knew he was not authorized to do so.

7. The defendant did not deposit any of the Checks into the VCC's Bank of America accounts, or into any other bank account affiliated with the Church, St. Patrick's, or the VCC.

8. Instead, the defendant intentionally presented each of the Checks to Wells Fargo Bank for deposit into his personal Wells Fargo Bank account ending in 8817, thereby intentionally misrepresenting to the Bank that he was authorized to deposit checks payable to the VCC into his own personal bank account, which he was not.

9. Before depositing each of the Checks, the defendant intentionally wrote his personal bank account number on the back of each of the Checks, and also added his signature to the back of each of the Checks.

10. The defendant did not forge any signature on any of the Checks, nor did he alter any of the Checks in any way, other than writing his own personal bank account number on and signing the back of each of the Checks.

11. Wells Fargo Bank accepted each of the Checks for deposit, and credited the defendant's personal bank account with the funds backing them. In so doing, Wells Fargo Bank was exposed to a risk of harm in the form of potential civil liability to the parishioners or their banks.

12. Based on the deposit of each of the Checks into the defendant's personal bank account, the donating parishioners' banks (Bank of America, California Savings and Loan, U.S. Bank National Association, Washington Mutual Bank, and JP Morgan Chase Bank) each debited the parishioners' accounts by the amounts listed on each Check. In so doing, each of the parishioners' banks was exposed to a risk of harm in the form of potential civil liability to the parishioners.

13. The defendant did not use any of the money backing any of the Checks for the benefit of the Church, St. Patrick's, the VCC, or the Church's parishioners.

14. During the entire period 2005 through 2008, the following financial institutions were insured by the Federal Deposit Insurance Corporation:

a. Wells Fargo a/k/a Wells Fargo Bank, NA

b. Bank of America a/k/a Bank of America, NA

c. California Savings and Loan a/k/a California Savings and Loan Association, A Federal Association a/k/a California Savings Bank a/k/a Pacific National Bank

d. U.S. Bank a/k/a U.S. Bank National Association

e. Washington Mutual Bank a/k/a Washington Mutual Bank, FSB

f. JP Morgan Chase Bank a/k/a JP Morgan Chase Bank, NA

g. Citibank a/k/a Citibank, NA

III. Law: Counts 1 through 14: 18 U.S.C. § 1344 – Bank Fraud

Title 18, United States Code, Section 1344, provides as follows:

> Whoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> (1) to defraud a financial institution; or
>
> (2) to obtain any of the moneys, funds, credits, assets, securities, or other property owned by, or under the custody or control of, a financial institution, by means of false or fraudulent pretenses, representations, or promises;
>
> shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

See 18 U.S.C. § 1344. Section 1344 is written in the disjunctive, meaning a defendant may commit the crime of bank fraud in either of two ways. *See Shaw v. United States v.*, 137 S. Ct. 462, 468 (2016) ("The two subsections [of Section 1344] overlap substantially but not completely."); *see also United States v. Shaw*, 781 F.3d 1130, 1134 (9th Cir. 2015) (vacated and remanded on other grounds by *Shaw*)[2] ("The Supreme Court effectively required courts to treat the two clauses [of Section 1344] separately, holding that while they overlap substantially, the clauses are disjunctive and establish distinct offenses.") (citing *Loughrin v. United States*, 134 S. Ct. 2384, 2390 n. 4 (2014)); *see also United States v. Arias*, 253 F.3d 453, 457-58 (9th Cir. 2001) ("[When] the statute speaks disjunctively, the conjunctive

[2] The Supreme Court's unanimous opinion examining the Ninth Circuit's decision in *Shaw* endorses, almost entirely, the Ninth Circuit's analysis. The one exception – the issue prompting the Supreme Court to vacate the Ninth Circuit's decision in *Shaw* and remand for further proceedings – was an issue having to do with jury instructions given by the District Court on an issue not relevant here. *See Shaw*, 137 S. Ct. at 469-70. The Ninth Circuit has yet to issue a subsequent opinion on remand, but there is nothing in the Supreme Court's opinion suggesting that the Ninth Circuit's original interpretation of Section 1344 was flawed.

is not required even if the offense is charged conjunctively in the indictment."). In this case, the stipulated facts support convictions under both Section 1344(1) and Section 1344(2).[3]

A. *18 U.S.C. § 1344(1)*

The elements of Bank Fraud under Section 1344(1) are:

a. Defendant knowingly executed a scheme to defraud a financial institution[4] as to a material matter;

b. Defendant did so with the intent to defraud the financial institution; and

c. The financial institution was insured by the Federal Deposit Insurance Corporation.

See Ninth Cir. Model Crim. Jury Instr., § 8.125 (2010) (modified).

The government must prove that the defendant intended to "defraud" the bank. *See Loughrin*, 134 S. Ct. at 2389-90. In this context, "[a]n intent to defraud is an intent to deceive or cheat." *See* Ninth Cir. Model Crim. Jury Instr., 8.125 (2010). But the government is not required to prove that the defendant intended to cause any financial harm to the bank. *Shaw*, 137 S. Ct. at 466-67. Rather, all that is required is that the defendant intentionally execute a scheme to deceive the bank. *See id.* ("[T]he statute, while insisting upon 'a scheme to defraud,' demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss.").[5] This requirement is satisfied where the defendant: Knew the bank possessed the target account; made a false statement to the bank believing the statement would lead the bank to release funds from the account; and the bank possessed a property interest in the account. *See id.* at 467-68.

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[3] The United States respectfully requests that, should the Court's ultimate judgment in this case include a conviction, the Court specify whether each such conviction is based on Section 1344(1), Section 1344(2), or both.

[4] A "financial institution," as defined in 18 U.S.C. § 20, includes federally insured banks. *See Shaw*, 137 S. Ct. at 465.

[5] In *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989), the Ninth Circuit reversed the conviction of a defendant who filed false applications for employment certifications on behalf of his clients on the grounds that the party deceived (the government) and the party deprived of money (the clients) were not the same. *Id.* at 221 ("[T]he intent must be to obtain money or property from the one who is deceived."). The defendant in *Shaw* cited *Lew* in support of his argument that Section 1344 should be read to include a similar requirement. *See United States v. Shaw*, 9th Cir. Brief of Appellant, 2014 WL 534799, at * 8. Although the Ninth Circuit did not directly address *Lew* in its opinion, it did reject Shaw's arguments. *See Shaw*, 781 F.3d at 1136.

In order to satisfy Section 1344(1), the deception must relate to a "material matter," Ninth Cir. Model Crim. Jury Instr., 8.125 (2010), which, in this context, means in a way designed to cause the bank to part with money or property, regardless of whether the bank technically owns, or merely possesses, that money or property. *See Shaw*, 137 S. Ct. at 466 ("[F]or purposes of the bank fraud statute, a scheme fraudulently to obtain funds from a bank depositor's account normally is also a scheme fraudulently to obtain property from a 'financial institution,' at least where, as here, the defendant knew that the bank held the deposits, the funds obtained came from the deposit account, and the defendant misled the bank in order to obtain those funds."); *see also* Ninth Cir. Model Crim. Jury Instr., 8.127 (2010) (defining "material matter," in the context of Section 1344(2) as follows "statements or promises [are material if] they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property.").

There is no requirement that the bank suffer any loss, or that the defendant intend to expose the bank to a risk of loss. *See Shaw*, 137 S. Ct. at 466-67; *see also* Ninth Cir. Model Crim. Jury Instr., 8.125 (2010). Even if there were such a requirement, it would be "easily satisfied" where the bank is exposed "to a risk of loss in the form of administrative costs and the threat of competing creditor claims if it were forced to liquidate the collateral." *See Shaw*, 781 F.3d at 1135 (citing *United States v. Wolfswinkel*, 44 F.3d 782, 786 (9th Cir. 1995)).

In sum, Section 1344(1) prohibits the knowing execution of a scheme to defraud a bank of a property interest by deceiving the bank, but is not limited to those defendants who intend to deprive the bank of an ownership interest in property or to expose the bank to a monetary loss or risk of loss.

Numerous courts have evaluated whether intentionally depositing checks into incorrect accounts is bank fraud. In *United States v. Ponec*, 163 F.3d 486 (8th Cir. 1998), the Eighth Circuit affirmed the defendant's conviction under Section 1344 where the evidence at trial proved he had deposited checks payable to his employer into his personal bank account, without authority, using pre-printed deposit slips for his personal account. *Id*. at 487. The court rejected Ponec's arguments that the bank did not suffer any harm, and that it was not his intent that it would, on the grounds that Section 1344(1) "says nothing about loss to the institution, either actual or intended. So long as one has 'defraud[ed]' a financial institution, one has violated the statute, whether or not loss has occurred." *Id*. at 488 (citing *United*

States v. Solomonson, 908 F.2d 358 (8th Cir. 1990)).

The court also rejected Ponec's argument that he had not "defrauded" the bank because he did not make any false statement to it, as follows:

> We cannot agree, however, that no misrepresentation or misstatement occurred under the facts of this case. When Mr. Ponec offered for deposit checks made to [his employer] Pro-Data and specified that the deposit be made into his personal account, he was representing to the bank that the proceeds of the checks rightfully belonged to him, or, at least, that he had been authorized by Pro-Data to deal with the checks in this way. Neither statement was true. Had the bank known the truth, it certainly would not have wanted its tellers to put the checks into Mr. Ponec's own account. When Mr. Ponec wrote his own account number on the deposit tickets, he was falsely representing that he had the right to put these checks into his own account. We think this conduct is a scheme or artifice to defraud within the meaning of Section 1344. . . . [T]he false assertion in the present case appeared not on the checks, but on the deposit ticket, which implicitly represented that defendant was dealing with the checks as he had a right to do.

Id. at 489.[6]

Similarly, in *United States v. MacDonald*, 209 F. App'x 748, 2006 WL 3634376 (10th Cir. 2009) (unpublished), a defendant convinced her victims that she could help them obtain a loan if they gave her an up-front payment, which they did in the form of two $50,000 cashier's checks payable to Mountain America Credit Union ("MACU"). The defendant then deposited the checks into her personal bank account. *Id*. at 749-50. The Tenth Circuit affirmed the defendant's conviction under both Sections 1344(1) and 1344(2). With respect to Section 1344(1), the court held that "McDonald made implicit false misrepresentations to MACU that she had authority to deposit the two cashier's checks into her personal bank account, which was critical to completing her fraudulent plan. These misrepresentations constitute sufficient evidence of McDonald's intent to defraud MACU." *Id*. at 751 (citing *United States v. Young*, 952 F.2d 1252, 1255-57 (10th Cir. 1991) (affirming conviction under Section 1344(1) where defendant deposited stolen checks into an unauthorized account she opened, represented to the bank she had signature authority over the unauthorized account, and signed checks for her personal expenses) (citing *United States v. Morgenstern*, 933 F.2d 1108, 1110-13 (2d Cir. 1991)).

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[6] Accordingly, the Eighth Circuit explicitly rejected Ponec's reliance on *Williams v. United States*, 458 U.S. 279 (1982). "Defendant points to language in *Williams* stating that 'a check is not a factual assertion at all, and therefore cannot be characterized as "true" or "false."' But the false assertion in the present case appeared not on the checks, but on the deposit ticket, which implicitly represented that defendant was dealing with the checks as he had a right to do." *Id*. (citation omitted).

B. *18 U.S.C. § 1344(2)*

The elements of Bank Fraud under Section 1344(2) are:

a. Defendant knowingly carried out a scheme or plan to obtain money or property from the financial institution by making false statements or promises;

b. Defendant knew that the statements or promises were false;

c. The statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property;

d. Defendant acted with the intent to defraud; and

e. The financial institution was federally chartered or insured.

See Ninth Cir. Model Crim. Jury Instr., 8.127 (2010) (modified).

In *Loughrin,* the Supreme Court addressed the requirements of Section 1344(2) in detail. *Loughrin* makes clear that Section 1344(2) is violated when a defendant acts with the object of obtaining property under a bank's control by way of a false representation made either to the bank or someone else. *See* 134 S. Ct. at 2389. There is no requirement that the defendant intend to defraud the bank, or even that the bank be exposed to a risk of loss. *Id.* at 2389, 2395 n.9. Although Section 1344(2) is sometimes referred to as targeting "schemes to obtain property held by the bank via misrepresentation to a third party," *see, e.g., Shaw*, 781 F.3d at 1134, a conviction under Section 1344(2) may be premised on material misstatements to the bank itself. *See Shaw*, 137 S. Ct. at 468-69 ("[The language of Section 1344(2)] covers much that [Section 1344(1)] also covers, for example, making a false representation to a bank in order to obtain property belonging to that bank."). The court in *MacDonald* had "little trouble" affirming the defendant's conviction under Section 1344(2) on the theory that her "misrepresentation to MACU that she had the authority to deposit the two checks into her personal account constituted a scheme to obtain funds under the custody of MACU 'by means of false or fraudulent pretenses, representations or promises.'" *MacDonald*, 209 F. App'x at 751 (citing *United States v. Briggs*, 965 F.2d 10, 12 (5th Cir. 1992), & *Morgenstern*, 933 F.2d at 1113); *see also Loughrin*, 134 S. Ct. at 2393 ("Section 1344(2)'s 'by means of' language is satisfied when, as here, the defendant's false statement is the mechanism naturally inducing a bank (or custodian of bank property) to part with money in its control. That occurs, most clearly, when a defendant makes a misrepresentation to the bank itself – say, when he attempts to cash, at the teller's window, a forged or altered check.").

Similarly, in *United States v. Morgenstern*, 933 F.2d 1108 (2d Cir. 1991), the Second Circuit affirmed the defendant's conviction under Section 1344(a)(2) where the defendant fraudulently induced his employer to sign checks payable to "Chemical Bank" for non-existent tax liabilities, and then deposited those checks into a bank account he controlled. The defendant argued that there was no evidence he intended to harm the bank. *Id*. at 1112. The government argued that the defendant's scheme involved two types of deceptive conduct – the first directed at his employers, and the second directed at the bank. *Id*. at 1113. In affirming, the Second Circuit focused exclusively on the second type of deceptive conduct, finding that there was substantial evidence the defendant "deliberately engaged in a pattern of deceptive conduct designed to convince the bank that he was acting as a duly authorized agent of [his employer] in depositing checks payable to Chemical Bank into a corporate account over which he had control."

> This deceptive course of conduct toward Chemical Bank extended well beyond the silent presentation of individual checks and deposit tickets. It amounted to a false representation that he was properly authorized to deposit [his employers'] checks payable to Chemical Bank into the [account he controlled]. . . . Furthermore, at trial Judge Sweet explicitly instructed the jury that in order to convict Morgenstern of bank fraud, his fraudulent scheme must be shown to have been carried out by means of fraudulent pretenses directed at the bank with the intention of deceiving it. Morgenstern's conviction indicates that the jury so found, and the evidence amply supports that conclusion.

Id. Thus, *Morgenstern* supports the theory that a depositor commits bank fraud when he intentionally deceives a bank into believing, incorrectly, that he has authority to deposit checks into an account.

IV. Analysis

The stipulated facts are sufficient to establish violations of both Section 1344(1) and 1344(2). Those facts prove that Defendant deposited checks made out to the VCC into his personal bank account. He acted with knowledge that he did not have authority to deposit checks payable to the VCC into his personal bank account, and with the intent to misrepresent to the bank that he did have such authority. In other words, Defendant intended to deceive Wells Fargo into believing, incorrectly, that he was authorized to deposit checks in this way. This conduct exposed Wells Fargo and the check-writers' banks (all of which were insured by the Federal Deposit Insurance Corporation) to a risk of harm in the form of potential civil liability. These facts satisfy each of the elements of both Sections 1344(1) and 1344(2).

As to Section 1344(1):

a. Defendant knowingly executed a scheme to defraud a financial institution as to a material matter.

This element is satisfied by Paragraphs 6, 8, and 12 of the First Stipulation of Fact for Trial. The "scheme to defraud" is described below. Defendant's deception related to a material matter because it was designed to cause Wells Fargo to part with money by crediting Defendant's account, which did happen. To the extent the Court reads Ninth Circuit precedent to require that the bank be at least exposed to a risk of loss, that requirement is satisfied by Paragraphs 11 and 12.

b. Defendant did so with the intent to defraud the financial institution.

This element is satisfied by Paragraphs 4 through 12 of the First Stipulation of Fact for Trial. The Defendant knew he was not authorized to deposit checks made payable to VCC into his personal bank account, but he did so anyway, and in so doing, he intentionally sought to deceive his Wells Fargo into believing, incorrectly, that he was authorized to deposit checks in this way.

c. The financial institution was insured by the Federal Deposit Insurance Corporation.

This element is satisfied by Paragraphs 4, 8, and 14 of the First Stipulation of Fact for Trial, which provides that Defendant's bank, and the banks against which all of the parishioners' checks were drawn, were insured.

As to Section 1344(2):

a. Defendant knowingly carried out a scheme or plan to obtain money or property from the financial institution by making false statements or promises.

As discussed above, the First Stipulation of Fact for Trial establishes both: 1) Defendant intended to deceive Wells Fargo about his authority to deposit the checks; and 2) this deception related to a material matter because it was designed to cause Wells Fargo to credit Defendant's personal bank account.

b. Defendant knew that the statements or promises were false.

This element is satisfied by Paragraphs 6 and 8 of the First Stipulation of Fact for Trial. Although he knew he was not authorized to deposit the checks into his personal bank account, he presented them to

Wells Fargo for deposit intending to deceive the bank into believing, incorrectly, that he was authorized to deposit checks in this way. The false statement was Defendant's implicit representation to the bank that he had authority to deposit the checks, and he knew he lacked that authority.

c. The statements or promises were material; that is, they had a natural tendency to influence, or were capable of influencing, a financial institution to part with money or property.

As discussed above, the First Stipulation of Fact for Trial establishes that Defendant's deception related to a material matter because it was designed to cause Wells Fargo to credit Defendant's personal bank account.

d. Defendant acted with the intent to defraud.

As discussed above, the First Stipulation of Fact for Trial establishes that Defendant intended to deceive Wells Fargo about his authority to deposit the checks.

e. The financial institution was federally chartered or insured.

This element is satisfied by Paragraphs 4, 8, and 14 of the First Stipulation of Fact for Trial, which provides that Defendant's bank, and the banks against which all of the parishioners' checks were drawn, were insured.

The defense may believe that Defendant did not commit bank fraud because he did not forge anyone's signature on the checks at issue. This is not a defense. It is true that courts have reversed bank fraud convictions in cases where there is no evidence of forgery. For example, in *United States v. Thomas*, 315 F.3d 190 (3d Cir. 2002), the Third Circuit reversed bank fraud convictions where the defendant convinced her employer to sign blank checks, purportedly for legitimate purposes, and then made the checks payable to cash or herself and stole the proceeds, on the basis that there was no evidence the defendant intended to harm a bank. *See id*. at 202; *see also United States v. Laljie*, 184 F.3d 180, 190-91 (2d Cir. 1999) (reversing bank fraud convictions based on checks without forgery on the grounds that the bank was not exposed to risk of loss); *United States v. Davis*, 989 F.2d 244 (7th Cir. 1993) (same). But *Thomas*, relying as it did on the requirement of intent to harm the bank, was abrogated by *Loughrin*. And, in this case, the parties have stipulated that the banks were exposed to a risk of harm in Paragraphs 11 and 12 of the First Stipulation of Fact for Trial.

At least one court has arguably held that there was no misrepresentation in presenting for deposit an otherwise genuine check, payable to the defendant, which the defendant had fraudulently induced the maker to issue. *See United States v. Rodriguez*, 140 F.3d 163, 169 (2d Cir. 1998) ("The checks were made payable to Rodriguez and upon presentment, duly signed by her. Under these circumstances, Chemical Bank took the checks as a holder in due course, free of any claims or defenses had Thomas Publishing decided to institute an action against Chemical Bank. Accordingly, under these facts, with no other evidence adduced at trial indicating that Rodriguez intended to victimize Chemical Bank by exposing it to an actual or potential loss, a jury could not have found that essential element of the crime of federal bank fraud."). *Rodriguez* is distinguishable for two reasons. First, to the extent it relies on the requirement of intent to harm the bank it was abrogated by *Loughrin* for the same reason as *Thomas*. Second, since the defendant in *Rodriguez* was a "holder in due course" of the checks at issue, *Rodriguez*, 140 F.3d at 169, it is distinguishable from the present case in that Defendant was not a "holder in due course" of the charged checks because those checks were not payable to him.

In fact, the deception or misrepresentation required by both Section 1344(1) and Section 1344(2) are satisfied when a defendant presents a check for deposit in a manner that implies he has authority to do so, if he does not have such authority and he intends to convince the bank that he does. *See Ponec*, 163 F.3d at 489 (defendant's implicit representation to bank that he had authority to deposit checks sufficient under Section 1344); *MacDonald*, 209 F. App'x at 751 (defendant's implicit representation to bank that she had authority to deposit checks sufficient under Section 1344(1)); *Morgenstern*, 933 F.2d at 1113 (defendant's implicit representation to bank that he had authority to deposit checks sufficient under Section 1344(2)); *see also United States v. Ayewoh*, 627 F.3d 914, 922 & n.6 (1st Cir. 2010) ("The majority of our sister circuits have broadly held that the misrepresentation element of § 1344 is fulfilled by any intentional act or statement by an individual that falsely indicates, explicitly or implicitly, that he has authority to withdraw money from a bank.") (citing cases). The parties have stipulated that Defendant so acted.

V. Conclusion

The stipulated facts are sufficient to establish violations of both Section 1344(1) and Section 1344(2), beyond any doubt. The stipulated facts establish that Defendant deposited checks made out to the VCC into his own personal bank account. He knew that he was not authorized to deposit VCC checks into his own account, yet he presented those checks to Wells Fargo with the intention of deceiving the bank into believing, incorrectly, that he was authorized to deposit checks in this way. This conduct exposed Wells Fargo and the check-writers' banks (all of which were insured by the Federal Deposit Insurance Corporation) to a risk of harm in the form of potential civil liability. These facts satisfy each of the elements of both Section 1344(1) and Section 1344(2).

Accordingly, the United States respectfully requests verdicts of guilty on Counts 1 through 14 under both Section 1344(1) and Section 1344(2), or, alternatively, under either Section 1344(1) or Section 1344(2) for each Count.

Respectfully submitted this 30th day of January, 2017,

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